SUPREME COURT, U. S.

SEP 29 1970

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1970

No. [redacted] 45

DON BERTRAM PRATT,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO.

DON BERTRAM PRATT,

Petitioner.

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 10, 1969, petition for rehearing denied on August 29, 1969. Insofar as the issues raised in the present Petition for Certiorari were decided adversely to Joseph Thomas Mulloy by the Court below, Petitioner Mulloy, whose Petition for Certiorari raises different issues, seeks to join in the present Petition pursuant to the provisions of Rules of the Supreme Court, Rule 23(5).

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed as Appendix A hereto, p. 1a. It affirmed a judgment of conviction of petitioner for failing to comply with an order of his local board to submit to induction into the Armed Forces of the United States in violation of 50 App. U.S.C. Section 462(a). Petitioner was tried in the District Court by a jury and there is no opinion of that Court.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 10, 1969, Appendix A, p. 1a, petition for rehearing denied on August 29, 1969, Appendix B, p. 3a. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Is the Universal Military Training and Service Act, as amended by the Military Selective Service Act of 1967, and as implemented by executive orders, proclamations and regulations, unconstitutional as violative of Article I, Section 8 and the due process clause of the Fifth Amendment to the Constitution of the United States?

2. Did the Court below err in refusing to consider whether the compulsory induction of the petitioner into the Armed Forces of the United States at this time would be violative of due process of law, as guaranteed by the Fifth Amendment to the Constitution of the United States, because it would

unreasonably force him to choose between his responsibilities under national law and his responsibilities under international law?

3. Did the Court below err in holding that the claim of the petitioner that his compulsory induction into the Armed Forces of the United States at this time would be in violation of international law could not be asserted as a defense to his prosecution for failure to submit to induction?

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8

"The Congress shall have Power***

To declare War***;

To raise and support Armies***;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

****

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof."

Amendment V

"No person shall *** be deprived of life, liberty, or property, without due process of law ***."

STATUTE AND TREATIES INVOLVED

The statute involved is the Military Selective Service Act of 1967, 50 App. U.S.C. Section 451 et seq. Because the provisions are lengthy, their pertinent text is set forth as Appendix C, p. 4a. The relevant treaties are the Charter of the International Military Tribunal at Nuremberg (Treaty of London), United Nations General Assembly Resolution 95 (I), Charter of the United Nations, Geneva Convention on Prisoners of War, Geneva Accords of 1954. Because the provisions are lengthy, their pertinent text is set forth as Appendix D, p. 25a-27a.

STATEMENT OF THE CASE

Petitioner was convicted in the United States District Court for the Western District of Kentucky for wilfully refusing to submit to induction into the Armed Forces, in violation of 50 App. U.S.C. Section 462(a). A sentence of five years' imprisonment and a fine of $10,000 were imposed. Petitioner was arraigned on March 18, 1968, at which time he pleaded not guilty and moved that the indictment be dismissed on the following grounds: (1) that the Uniform Military Training and Service Act, as amended by the Military Selective Service Act of 1967, and as implemented by executive orders, proclamations and regulations, was unconstitutional; (2) that his induction into the Armed Forces of the United States at this time would be violative of due process, because it would unreasonably force him to choose between his responsibilities under national law and his responsibilities under international law; (3) that his induction into the Armed Forces at this time would be violative of treaties, executive agreements and similar interna-

tional undertakings of the United States. On March 22, 1968, the District Court entered an order overruling petitioner's motion to dismiss.

The case was tried before a jury on April 4, 1968. At the conclusion of the government's case counsel for the petitioner moved for a judgment of acquittal, which was overruled. The petitioner was the sole witness on his behalf. He admitted that he refused to go through with processing at the induction station. He stated that he was unwilling to take the physical examination required as a part of the processing, because he had a lung condition known as pneumothorax (collapsed lung), and that if he had taken the examination, he might have been disqualified for service on medical grounds, to which he objected. (Appendix E, pp. 29a-30a). He then explained why he could not, in conscience, serve in the Armed Forces of the United States at this time. (Appendix E, p. 30a). The Court desired that counsel bring the questioning to an end, and counsel complied. Counsel was then permitted to put an avowal into the record, indicating that the petitioner could not obey certain military orders which he believed to be in violation of international law. (Appendix E, p. 31a).The petitioner's beliefs and the reasons for his refusal to submit to processing were further stated to the Court at the time of sentencing. (Appendix E, pp. 32a-35a). At the conclusion of the presentation of all the evidence, petitioner moved for a judgment of acquittal, which was overruled. The jury returned a verdict of guilty, and sentence was imposed on April 8, 1968.

The petitioner appealed his conviction to the United States Court of Appeals for the Sixth Circuit, which affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

I

The contention that the present military draft law is unconstitutional, as beyond the power of Congress under Article I, Section 8, and as violative of due process of law, has never been considered by this Court. This Court should grant certiorari to decide this important question of federal law, which goes to the essence of the power of the government to require compulsory military service in a democratic society.

The petitioner's constitutional challenge is directed to the specific military draft law, for the violation of which he has been convicted. Petitioner does not contend that Congress lacks the power under Article I, Section 8 to require military service of its citizens. *Selective Draft Law Cases*, 245 U.S. 366 (1918); *United States v. Nugent*, 346 U.S. 1, 9 (1953). Nor is it now open to contend that compulsory military service constitutes involuntary servitude in violation of the Thirteenth Amendment. *Selective Draft Law Cases*, *supra*, 245 U.S. at 390. It will also be conceded that Congress is not precluded from requiring compulsory military service on the ground that it could meet national defense manpower needs by voluntary enlistments, *United States v. Butler*, 389 F.2d 172 (6th Cir., 1968), *cert. denied*, 391 U.S. 1039 (1968), and that compulsory military service may be required in time of peace or in the absence of a formal declaration of war. *United States v. Henderson*, 180 F.2d 711 (7th Cir., 1950); *Etcheverry v. United States*, 320 F.2d 873 (9th Cir., 1963). Finally it will be admitted that Congress may provide limited exemptions from service and that it is not required to induct all persons who are eligible for such service. *Selective Draft Law Cases*, *supra*.

Neither the contention of the petitioner is that he cannot draft law, the Universal Military Training and Service Act, as amended by the Military Selective Service Act of 1967, and as implemented by existing executive orders, proclamations and regulations, exceeds the constitutional limits of Congressional power. In other words, the challenge is not directed to the power of Congress to enact *some kind of draft law*, but only to its power to enact the particular draft law that it has.

It is submitted first that the present draft law is not a necessary and proper exercise of the power to raise and support armies and to make rules for the regulation of the land and naval forces. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957); *Ex parte United States ex rel. Singleton*, 261 U.S. 234 (1960). Secondly, it is submitted that the classes of selective service and the method of selection, as provided in the law and implementing regulations, is not reasonably related to the purpose for which the power has been given, and is so unreasonable and arbitrary as to offend the concept of due process embodied in the Fifth Amendment. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). Thirdly, the kind of exemptions and deferments provided by the law make it operate in such a way as to unreasonably discriminate against certain classes of persons with respect to the burden of military service, particularly the burden of dying in combat, which discrimination is so unjustifiable as to be violative of due process of law. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Schneider v. Rusk* 377 U.S. 163 (1964). The substance of the lack of power and due process arguments is substantially the same. It is contended that Congress lacks the power under Article I, Section 8 to enact this kind of

draft law, precisely because the law is discriminatory and imposes the obligation of military service in an unfair and unreasonable way.

The challenge to the constitutionality of the present draft law is not foreclosed by prior decisions sustaining the constitutionality of *entirely different kinds of draft laws*. The only case in which the question of the constitutionality of the draft was directly before this Court was *The Selective Draft Law Cases, supra*; which involved a challenge to the World War I draft law, and the essential issue in that case was whether Congress had the power to require compulsory military service at all. Insofar as the decision may be taken to uphold the power of Congress to impose *selective service*, it is important to remember that the only exemptions were for designated government officials and for ministers and theological students. Conscientious objectors were not exempt, but were permitted to perform non-combatant service. 245 U.S. at 376. More significantly, it is the position of the petitioner that the rationale of that very decision, namely that the obligation to render compulsory military service is an obligation of national citizenship, *supports his contention that the present draft law is unconstitutional.*

The constitutionality of the World War II draft law was never before this Court, but the law too differed significantly from the present one. While there were certain deferments related to the maintenance of the war effort on the "home front," they were very limited. There was nothing like a deferment for married men with children nor a broad occupational deferment "in the national interest," and certainly no blanket student deferment. The only areas of study in which deferment was permitted were engineering, science and medicine, and by mid-1944 the male college population had declined to 30% of what it had been in 1938-40. Marmion, A Critique of Selective Service with

Emphasis on Student Deferment, in The Draft 24, 37 (Rev. ed., 1967). In describing the World War II draft law, one court observed that it was a "completely integrated statutory project for the induction of all male citizens of designated ages with certain minor exceptions and exemptions." Rase v. United States, 129 F.2d 280, 287 (6th Cir., 1942).

This Court's only examination of the validity of the Universal Military Training and Service Act was a statement in United States v. Nugent, 346 U.S. 1 (1953), where the issue was whether the procedure of the Department of Justice for reviewing claims of conscientious objection satisfied the statute and due process. In referring to the Act, this Court merely said:

> "The Selective Service Act is a comprehensive statute designed to provide an orderly, efficient and fair procedure to marshall the available manpower of the country, to impose a common obligation of military service on all physically fit young men. It is a valid exercise of the war power. It is calculated to function - it functions today - in times of peril. Even so, Congress took care to provide special treatment for those who could not reconcile participation in the defense effort with their religious beliefs - if those beliefs were a matter of sincere conviction." 346 U.S. at 9-10.

That case, it is clear, did not involve the substantive validity of the Act. And, of course, the system must now be viewed as it has been operating since the days of the Korean War, and as amended by the Military Selective Service Act of 1967.

It is submitted, therefore, that the precise issue presented by the Petition for Certiorari - the validity of the Universal Military Training and Service Act, as amended and implemented - has not been considered by this Court before. It is an issue of tremendous importance to millions of men of

draft age and their families, and an issue which raises fundamental questions concerning the nature of the power of the government in a democratic society to require military service of its citizens.

There is no question of the authority of this Court to invalidate the present draft law. It is true that the law was enacted under the "war powers" of Congress. However, as this Court has observed, "Even the war power does not remove constitutional limitations safeguarding essential liberties." *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 426 (1934), and "The phrase, 'war power,' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." *United States v. Robel*, 389 U.S. 258, 263 (1967). This Court has never hesitated to declare invalid legislation notwithstanding that Congress has purported to act under the war power. *Reid v. Covert*, 354 U.S. 1 (1957); *Ex parte Milligan v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *United States v. Robel, supra; United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955). *Cf. United States v. Singer*, 380 U.S. 163 (1965).

The enactment of a draft law by Congress involves the regulation of the liberty of the person, and indeed of life itself. While in recent years this Court has been loath to interfere with legislative regulation of economic activity and has given great weight to the legislative determination for the need of a particular kind of status, this approach has not been followed when the challenged legislation interferes with personal liberty, as demonstrated by cases such as *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), *Schneider v. Rusk*, 377 U.S. 163 (1964), and *United States v. Robel, supra*. This Court has scrutinized legislation interfering with the liberty of the person very carefully and has also

combined the availability of alternative means of exercising Congressional power. It is this kind of careful scrutiny and consideration of alternatives which must be undertaken with respect to the Universal Military Training and Service Act, since this Act not only places strong restraints upon liberty, but also requires that the citizen be prepared to give up his very life. It is only in this area where that kind of power exists, and this Court should grant certiorari to determine whether Congress has exercised that awesome power in a fair and reasonable manner.

Finally, it should be pointed out that a declaration of unconstitutionality will in no way interfere with the ability of the United States to carry out its military commitments and provide for the defense of the nation. If this Court invalidates the present draft law and Congress concludes that compulsory military service is necessary to protect the vital interests of the nation, all Congress need do is to enact a new law which meets constitutional requirements. The power of Congress to provide for some kind of draft law is not being questioned, only the power of Congress to enact the particular draft law that it has. This Court should grant certiorari to determine whether the present legislation has exceeded the bounds of constitutional power and due process of law, and if it has, this Court must invalidate it, giving Congress the opportunity to enact new and proper legislation. *United States v. Robel, supra.*

II

The Court should grant certiorari to consider whether the rationale for its decision in The Selective Draft Law Cases supports the contention that the present draft law is unconstitutional.

The essential contention of the petitioner is that the power of Congress to raise and support armies is subject to the condition that in a democratic society such as ours the obligation to render military service - including the burden of dying in combat - must be borne equally and fairly by all citizens. A draft law that does not impose this obligation in a fair and equitable manner, it is submitted, is not a law "necessary and proper" for carrying out the power of Congress to raise and support armies. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960). And where Congress requires service of some citizens but not others, and requires some to face the risk of death but not others, such selection having been made on the basis of unfair and improper criteria, it is submitted that those compelled to serve and to die have been deprived of their liberty and their life without due process of law.

In *The Selective Draft Law Cases*, 245 U.S. 366 (1918), this Court upheld the power of Congress to provide for compulsory military service on the ground that this was an obligation of national citizenship, secured by the Fourteenth Amendment. 366 U.S. at 389. And in response to the contention that compulsory military service constituted involuntary servitude, this Court stated:

> "Finally, we are unable to conceive upon what theory the exaction by government from the citizen of performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement." 245 U.S. at 390.

This Court has also said that:

> "Citizenship in this Nation is part of a cooperative affair. Its citizenry is the country and the country is its citizenry." *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

In that case it held that Congress was without power to strip any person of his American citizenship. Nor does our law tolerate any discrimination between native-born and naturalized citizens. *Schneider v. Rusk*, 377 U.S. 163 (1964).

If, as appears, all American citizens are entitled to the same benefits that such citizenship brings, all must bear equally the burdens that the privilege of such citizenship imposes. Particularly should this be true with respect to the burden of national citizenship that imposes military service, which may require that the citizen make the supreme sacrifice for the benefit of his country. The premise that the obligation of military service would be borne in a fair and equitable manner was embodied in all previous draft laws. As was observed in *Tatum v. United States*, 146 F.2d 406, 407 (9th Cir., 1944):

> "Congress could not and did not overlook the frightful social burdens attendant upon modern and so-called 'total war.' Our legislation was designed to spread these burdens as far as is humanly possible in an even and just fashion. Unhappily the sacrifices of the battlefield constitute the outstanding tragic and inescapable burden of war, and the Congress recognized this fact in enacting laws relating to service in the Armed Forces. It tried to spread this particularly depressing burden in an equitable manner."

It follows from these principles, it is submitted, that any draft law which does not "spread the burden in an equitable manner," is beyond the power of Congress under Article I and is violative of due process of law.

It is not contended that everyone of suitable age must be required to render military service. Admittedly some selection must be made, since there are nearly two million men reaching draft age each year, of which the Armed Forces are likely to need only from one-third to one-half, only a portion of which must be selected for involuntary induction. Report of the National Advisory Commission on Selective Service (hereinafter referred to as the Marshall Report), p. 3 (1967). If some selection must be made, and if the system of selection must spread the burden of military service and the burden of dying in an equitable manner, that scheme of selection, it is submitted, must satisfy certain criteria. In the first place, it must be reasonably related to the purpose of compulsory military service, which is to supply sufficient manpower for the Armed Forces as needed. More importantly, any distinctions in terms of (1) who serves, (2) what happens when one serves, and (3) the choice as to the time and manner of service must be reasonable, fair and non-discriminatory.

The contention of the petitioner is that the present draft law, with its method of selection and pattern of deferments and exemptions, does not satisfy these criteria. It does not spread the burden in a fair and equitable manner. It is not reasonably related to the purpose for which the power to require compulsory military service was given. The nature of the exemptions and deferments provided cause the system of selection to operate in such a way that it unreasonably discriminates against certain classes of persons with respect to the burden of military service, particularly the burden of dying in combat. The inequities and deficiencies in the present system of selection were detailed at length by the National Advisory Commission on Selective Service. Its recommendations for eliminating these inequities and deficiencies were considered by Congress when it enacted the

Military Selective Service Act of 1967, but few of these recommendations (which may or may not have removed the basic inequity and discrimination) were adopted. This Court should grant certiorari to determine whether the present draft law imposes the obligation of military service and of dying in such service in a "fair and equitable" manner, and if not, whether the law is beyond the power of Congress and violative of due process of law.

III

The criteria for selection for service and the procedures by which such selection is made are arbitrary, unreasonable and discriminatory.

The Congressional declaration of policy with respect to the present draft law adds a consideration that was absent in all prior laws, namely that the system of selection need not only be "fair and just," but also must be "consistent with the maintenance of an effective national economy." 50 App. U.S.C. Section 451 (*c*). As the deferments relating to an "effective national economy" have been administered, it is clear that the declaration of policy does not mean that a small number of eligible men will be deferred to maintain the defense effort "on the home front," as in World War II, but that a person may be effectively exempted from service, because he is "useful" in the ordinary industrial and agricultural economy. This stated purpose is totally inconsistent with the purpose of "fair and just" selection, and demonstrates very clearly the kind of differences that exist between the present draft law and the draft law that was upheld by this Court in the *Selective Draft Law Cases, supra.*

When the results of the present draft law, with its many exemptions and deferments are examined, it is clear that at a given time only a minority of men of draft age are eligible to

be called for service. The findings of the Marshall Report, for example, indicate that as of September 30, 1966, the approximately 7,000,000 men available for service, were classified as follows:

Available for induction (I-A & I-A-O)	1,350,000 (575,000 were under 19 or over 26)
Student deferment (II-S)	1,523,000
Registrant with child or hardship deferment (III-A)	3,638,000
Occupational or agricultural deferment (II-A)	278,000
Ministerial (IV-D)	97,000

Whenever one registrant is deferred or exempted, this increases the chances of another registrant's being called, so the matter of classification is of crucial importance. Classification is determined by local selective service boards. 32 C.F.R. Section 1622.1 (c). There are some 4000 local boards across the country and 96 appeals boards. The disparity in workload, the different standards they apply, the different procedures they follow, have been graphically described in the Marshall Report, pp. 17-28. There is no check on the *granting* of deferments and exemptions, and the boards may effectively let out of military service any person they choose. It was shown in the Report, for example, that about half of the registrants who were given an occupational deferment were in neither a critical occupation nor an essential industry as defined by the Department of Labor. And complete discretion is given to the National Director to defer or

exempt any person without regard to his eligibility for that deferment or exemption. 32 C.F.R. Section 1622.60.

It is clear that one's liability for military service will depend in no small part on where he happens to be registered, since the decision if effectively made by local selective service boards without anything remotely resembling uniform standards. (This is apart from "built-in" biases; the Marshall Commission found that in one state 55% of all board members thought that no one should ever be classified as a conscientious objector.) Today with improved means of communication, computers and the like, at a minimum national standards of eligibility could be established. See Marshall Report, pp. 31-36. The mechanism of the system itself, with the practically unfettered discretion of local boards, prevents the obligation of military service from being imposed in a manner that is "fair and equitable." It is submitted that this "obligation of national citizenship" cannot constitutionally be imposed in such an arbitrary and haphazard manner.

While the pattern of exemptions and deferments cannot be separated from the discretion of the local board to grant one to an individual registrant, the exemptions and deferments themselves are not reasonably related to the stated purpose of the Act, let alone to legitimate policies justifying discrimination between registrants. Leaving aside the ministerial exemption (it may be assumed that it is repugnant to our value acceptances that "men of the cloth" should bear arms) and the effective exemption of a married man with a child (it may be assumed that men without children may be compelled to go before men with them), we may consider particularly the occupational deferment (which usually becomes an exemption) and the student deferment (which may), as demonstrating the proposition for which the petitioner is contending.

Persons whose employment in industry, agriculture and other occupations "is found to be necessary to the maintenance of the national health, safety or interest" are entitled to be deferred, and the deferment may continue until the registrant becomes overage. 50 App. U.S.C. Section 456 (h)(2). There is no requirement that the individual's activity be in any way related to the military effort. See 32 C.F.R. Sections 1622.20, 1622.22, 1622.23. The stark question presented by this kind of exemption and the stated policy that selection must be "consistent with the maintenance of an effective national economy," is whether Congress may make the determination that a person have "less economic utility" can be required to give up his life for his country while his "economically more useful" brother is available to help the gross national product achieve unprecedented growth. Just as it is impermissible to distinguish between native-born and naturalized citizens with respect to the benefits of American citizenship, *Schneider v. Rusk*, 377 U.S. 163 (1964), so, it is submitted, is it impermissible to distinguish between the "economically more useful" and the "economically less useful" citizen with respect to the "supreme and noble" duty of rendering military service. The duty of dying in the service of one's country should not - and in a democratic society, it is contended, constitutionally cannot - be made to depend upon one's economic utility. Nor is it reasonable to suppose that in this day and age the economy will be wrecked if persons having "critical skills" - as defined by one of 4000 local draft boards - are removed so that they can render military service along with their fellow citizens. Insofar as deferment or exemption rests upon that basis, it is not reasonably related to any legitimate governmental objective.

But the most irrational and unjustifiable deferment is that given to *every full-time college student in the United States.*

50 App. U.S.C. Section 456(h)(1). The discrimination this effects with respect to the burden of dying will be discussed subsequently. For the present, it is sufficient to point out that this blanket deferment is completely unrelated to any legitimate governmental objective or to the stated purpose of the Act. Every student attending one of the thousands of colleges and universities throughout the Nation - with their widely varying standards - is entitled to this deferment. It does not matter whether he is an outstanding student or an average one, whether he is studying to acquire a "critical skill" or pursuing the most generalized subject matter. So long as he is in good standing, he cannot be put in the eligible pool. Apart from the discrimination that results when such a large class of persons is given the opportunity to choose when they will serve, there is simply no rational reason why such a deferment should be given. The existence of such deferment is not necessary to assure colleges and universities a steady flow of people, even if this were a legitimate basis for deferment. The situation is quite to the contrary. See Marshall Report, p. 41 The blanket student deferment thus bears no reasonable relationship to the defense effort nor to the maintenance of an effective national economy. Certainly it does not help to make the obligation of service "fair and just."

It is submitted that Congress may not provide exemptions and deferments, enabling certain classes of citizens to avoid or delay such service, without clear and demonstrable justification for so doing. Because what is involved here is personal liberty, and indeed, life itself, the method of selection - with its pattern of exemptions and deferments - must be viewed in light of the reasonable alternatives which are available to accomplish the objective of supplying needed military manpower. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), *United States v. Robel*, 389 U.S. 258 (1967). The

grounds of exemption and deferment are inconsistent with the basic premise underlying the imposition of compulsory military service, as stated by this Court in the *Selective Draft Law Cases*, 245 U.S. 366 (1918). The irrationality and unfairness of the system of exemptions and deferments is further compounded by the procedure for selection, which is entrusted to the virtually unchecked discretion of some 4000 local boards and 96 appeals boards. To require a person to bear the obligation of national citizenship in this manner is beyond the power of Congress under Article I and is violative of due process of law.

IV

The method of selection for service operates to discriminate unfairly against persons of lower socio-economic status, particularly with respect to the burden of rendering combatant service.

Since the burden of rendering military service is an obligation of national citizenship, *Selective Draft Law Cases, supra*, the burden of such service - including the burden of dying in combat - must be borne equally by all classes of citizens without regard to economic status. Discriminatory treatment between citizens of the United States is prohibited, *Schneider v. Rusk*, 377 U.S. 163 (1964), and it is well-settled that difference in treatment depending upon economic condition constitutes impermissible discrimination. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963).

The method of selection under the present draft law contains a *built-in* discrimination against persons of lower socio-economic status, which becomes most acute when the obligation to render combatant service, as opposed to

military service in general, is considered. These persons are denied the benefits given to other classes of registrants, and most importantly, they are required to bear the burden of combatant service disproportionately to registrants of higher socio-economic status.

The built-in discrimination against persons of lower socio-economic status results essentially from the blanket student deferment, although other deferments and exemptions may contribute to it. On its face the blanket student deferment simply enables a large group of registrants - more than are in the available pool for induction at a given time - to defer their service for four years. Actually, the discrimination is much more significant. Prior to the Military Service Act of 1967, student deferment often meant exemption. See Marshall Report, p. 23. Now it appears likely that college graduates will have to serve in larger numbers than previously, since it will be more difficult (though still possible) for college graduates to cumulate deferments until they become effectively exempt.

This will not remove the real inequity in the system, as Congress was well aware when it enacted the Military Selective Service Act of 1967. See generally the Additional Views of Members of the House Committee on Armed Services, House Report No. 267, *U.S. Code Cong. & Admin. News*, 1967, vol. 1, pp. 1350-1352. The existence of the blanket student deferment still creates an impermissible distinction with respect to the opportunity to postpone service. The person who is able to attend college can, in effect, decide when he will serve. He can gamble that he will be better off by going in at a later date when hostilities may have ceased. He also has more time to try to avoid the draft by entering into a reserve program. Whatever may be the effect of his choice, the fact remains that he is given that choice solely because he is able to attend college.

To make the choice available on that circumstance amounts to rank discrimination based upon economic condition. At present over seven million men and women are enrolled in institutions of higher education. It is a matter of common knowledge that any high school graduate, so long as he has enough money to maintain him for the period, can find some institution somewhere, where he can remain for four years and obtain a degree. The only condition is that he be able to afford it. Many people cannot. As the Marshall Commission has pointed out, "Even though education opportunity is increasingly widespread, the opportunity to go to college still reflects a degree of social and economic advantage not shared by all." Marshall Report, p. 41. While scholarship and loan assistance might be available to the "better" students from lower socio-economic class families, this will not help (1) the lower socio-economic class person who has to help support his family and therefore cannot attend college at all or can attend only on a part-time basis, or (2) the mediocre student who would not be able to obtain a scholarship or loan. However, the mediocre student from a family that is "better off" can get to school and can get the deferment. Nor is there any reason why college students as a class should get preferred treatment. It cannot be said that as a class they are "more useful citizens." There are many occupations which contribute vitally to the economy and the nation for which a college degree is not required.

The privilege of deferment for college students simply operates to create a favored class and to discriminate against those unable or unwilling to spend four years attending some college somewhere. Those who are able and willing can postpone their military service to what they think will be a more propitious time; those who are not must go when called. The effect is to create a closed class designed to give

advantage to members of that class while excluding others similarly situated, and this is constitutionally impermissible. *Morey v. Doud*, 345 U.S. 457 (1957); *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459 (1937); *Baxstrom v. Herold*, 383 U.S. 107 (1966). The discrimination is all the more impermissible because it is based upon economic condition. *Griffin v. Illinois*, *supra*; *Douglas v. California*, *supra*.

Much more serious, however, is the *result* of the discrimination. Not only does the blanket student deferment give those in the favored class the opportunity to choose the time of their service, but it *substantially reduces the probability that if and when they do serve, they will have to perform combatant service.* In other words, the burden of dying is imposed unfairly and disproportionately on those draftees who have not attended college. This results from the military's policy of manpower allocation, of which Congress could not have been unaware when it provided the blanket student deferment. It is the policy of the military to assign younger, less-educated enlisted men to the combat arms of the ground forces and to assign older, more-educated enlisted men to the other arms and to more specialized tasks. The combat arms must emphasize physical agility and stamina, and the optimum age for physical performance seems to be between 18 and 25. The largest age group in the Armed Forces will be either 20 or 21. Hays, A Military View of the Selective Service, in The Draft, pp. 7, 13 (Tax, ed., 1967). Non-college draftees are likely to go in at a younger age, and of course, will have had less education. It is accurate to say that the majority of college graduate draftees are from the higher socio-economic groups, while the majority of the non-college draftees are from the lower socio-economic groups (but not from the *lowest* of the groups, since many persons in that category are rejected for service). The

experience in the Korean War shows that the burden of dying among enlisted men - the capacity in which draftees serve -was directly related to socio-economic grouping. The following information was presented in the Hearings before the House Committee on Armed Services in May, 1967:

> "Among non-commissioned officers and enlisted men in the ground forces where the bulk of Korean War casualties occurred, the heaviest incidence of casualties was among the lower socio-economic groups. The lowest income groups had four times the casualty rate of the highest group, while Negro casualties were proportionately twice as numerous. The division of labor in the military establishment meant that young men with better education (and higher socio-economic position) were sent to advanced training and specialized units where casualty rates were lower. Infantry units, those units which in the language of the military require 'soft skills,' were staffed with men of limited educational level and reflected a lower class and rural background." Janowitz, American Democracy and Military Service, included in Hearings on the Extension of the Universal Military Training and Service Act, May 1967, p. 2039.

It is contended that the same pattern would appear if statistics as to casualty rates in Vietnam, distinguishing between college graduate draftees and others, were available. Such information was sought through discovery in the District Court, but the motion was denied. Assuming that the same policy of manpower utilization prevails - and there is no reason to believe that it does not - the non-college draftee is far more likely to be assigned to a ground combatant unit while his college counterpart is almost certain to avoid combatant service.

Rendering combatant service - fighting and dying in war - is done by those who did not receive a student deferment, a

distinction depending in no small measure upon one's socio-economic status. If the rationale of the decision of this Court in the *Selective Draft Law Cases, supra*, means anything, it must mean that. It is exactly this kind of discrimination which, it is submitted, results from the operation of the present draft law, and for that reason, if for no other, this Court should grant certiorari to determine its constitutionality.

V

This Court should grant certiorari to determine the important federal question of whether the compulsory induction of the petitioner into the Armed Forces of the United States at this time would be violative of due process, because it would unreasonably force him to choose between his responsibilities under national law and his responsibilities under international law.

Under national law the petitioner is required to render compulsory military service, and he has been sentenced to five years' imprisonment for his refusal to do so. 50 App. U.S.C. Section 462(a). If he had submitted to induction, as an individual soldier he would have had no control over the military policy of the United States, either with respect to what military activity took place or how it was conducted. As a matter of national law he would be required to obey orders issued by superior officers. 10 U.S.C. Sections 890-892. At the same time as an individual soldier he has responsibilities to international law, for the violation of which he may be punished. Charter of the International Military Tribunal at Nuremberg (Treaty of London), Art. 6, 59 Stat. 1544; *United States, et al. v. Hermann Wilhelm*

Goergin, et al. (Judgment of the International Military Tribunal at Nuremberg), 1946, 6 F.R.D. 69, 110 (1947); *Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946). He may also be punished for the violations of international law under domestic law. Congress is given the express power to define and punish offenses against the law of nations, U.S. Const., Art. I, Section 8, cl. 6, and the law of nations forms a part of the common law. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820). In *Ex parte Quirin* and *In re Yamashita*, this Court upheld the authority of American tribunals to impose punishment, as a matter of domestic law, against enemy belligerents who had committed offenses against the law of nations. Finally, the responsibility of the individual soldier under international law is expressly made applicable to members of the American Armed Forces, and they are so advised. See The Law of Land Warfare, Dept. of the Army Field Manual, FM 27-10, Ch. 1, Sec. 1, par. 2, Ch. 8, Sec. 2, pars. 11, 498(d), 509(a).

Therefore, when an individual of draft age believes that the military activities of his government are in violation of international law, he is put in a fearful dilemma. If he refuses to enter military service, or once in service, refuses to obey an order, he is subject to punishment under national law. But if he does enter into military service, he is required to assist in the carrying out of activity that he believes to violative of international law and may be ordered to do specific acts likewise believed to be violative of international law. To force an individual into such a position, it is submitted, is contrary to those "minimum standards which are of the very essence of a scheme of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and is so "fundamentally unfair as to shock the judicial conscience," *Rochin v. California*, 342 U.S. 165 (1952), and therefore, is violative of due process of law.

This is precisely the position of the present petitioner. He believes that the military involvement of the United States in Vietnam constitutes "aggression." He further believes that in Vietnam the Armed Forces of the United States are committing war crimes and crimes against humanity. The beliefs of the petitioner were stated in his testimony at the trial and at the time he was sentenced (Appendix E, pp. 30a-31a, 32a-35a). There appears to have been no dispute as to the substance of his beliefs. To relate the beliefs of the petitioner, a layman, to the specific provisions of international law is the function of counsel, and these beliefs may be summarized as follows. First, it is believed that American military involvement in Vietnam constitutes a crime against peace in violation of Art. 6(a) of the Nuremberg Charter, in that such involvement amounts to aggression and war in violation of international treaties and assurances. As part of this contention, it is maintained that the American military presence in Vietnam is a violation of the Geneva Accords of 1954, which the government of the United States has pledged to honor. This involvement is also prohibited by the Charter of the United Nations, particularly Arts. 2, 24, 33, 39, 51 and 103, 59 Stat. 1031. An added dimension is presented because such involvement has not followed from a declaration of war by Congress or authorization by the Security Council or General Assembly of the United Nations. See the dissents from the denial of certiorari in *Mora v. McNamara*, 389 U.S. 934 (1967); *Mitchell v. United States*, 386 U.S. 972 (1967). Secondly, it is believed that the Armed Forces of the United States and those of its allies are engaged in the commission of war crimes and crimes against humanity in violation of Art. 6(b)(c) of the Nuremberg Charter. Such crimes are in further violation of the Geneva Convention of 1949, 6 U.S. T.I.A.A. 3317, and the Hague Convention of

1899, 32 Stat. 1779.

These beliefs are shared by many American citizens, and they are also held by a number of lawyers who are experts on international law. See *e.g.*, Lawyers Committee on American Policy Towards Vietnam, Vietnam and International Law 86 (1967), where it is stated:

> "It is our belief that a conscientious and impartial re-examination will establish the illegality of the current United States position in Vietnam and that it will further reveal that it is in the short-term and long-term interest of the United States to bring these policies into conformity with international law."

Other lawyers may disagree and believe that American involvement in Vietnam is not violative of international law. The petitioner *does* believe that this involvement is illegal and has read numerous reports in the nation's press relative to the commission of war crimes and crimes against humanity by the United States and its allies. He has also been informed about the commission of war crimes and crimes against humanity in Vietnam by particular American servicemen, whom he offered to produce as witnesses.

The issue raised herein does *not* require the Court to resolve the issue of violation of international law. It is the submission of the petitioner that so long as these beliefs are sincerely held (as to which no question appears to have been raised) and are not clearly unreasonable, a person so believing may not be required to render military service when, in his opinion, this would compel him to assist in or actually commit violations of international law. It must also be remembered that responsibility for the violation of international law is not limited to "leaders" and "instigators," but extends to "accomplices." Likewise "accomplices" are responsible for the acts of "leaders." Even if the petitioner were not sent to Vietnam, his argument is that by serving in

the Armed Forces at this time, he becomes an "accomplice" to aggressive and illegal war and to the commission of war crimes and crimes against humanity. By participating in the common effort, he assists the carrying out of the war and is responsible for the acts of others. Nuremberg Charter, Art. 6. The petitioner was unwilling to be a *resource* of the United States Army at this time in the nation's history (Appendix E, p. 30a), and his unwillingness was founded on the belief that to be such would make him responsible for the violations of international law that he believes are being committed by American military involvement in Vietnam.

The situation of the present petitioner is similar to that of the defendant in *United States v. Sission*, 297 F.Supp. 902 (D. Mass. 1969), where the Court held, *inter alia*, that it would be unconstitutional to compel one opposed to American involvement in Vietnam on grounds of conscience to be inducted into the Armed Forces. The present petitioner's objection is not only founded on conscience, but upon the belief that to submit to induction would be violative of his responsibilities under international law.

This Court should grant certiorari to resolve this important question of federal law, which has not been presented to it before.

VI

This Court should grant certiorari to consider whether a conviction for refusal to submit to induction may be sustained without allowing the defendant to prove his contention that his compulsory induction into the Armed Forces at this time would be illegal, because at this time said

Armed Forces are being employed in violation of international law.

The substantive contention of the petitioner is that when the government of the United States, as represented by the executive branch, is engaged in military activity that is violative of the treaties and international undertakings to which the United States has subscribed, that government may not compel one of its citizens to render military service. This contention, if accepted, would mean first that the draft laws are suspended, so to speak, until such time as the government is no longer using those laws to assist in the violation of its treaties and international undertakings, and second that the government, as represented by the courts, cannot convict and imprison a person for refusing to become a part of the apparatus that is engaged in violating the treaties and international undertakings of the United States. The basis of this argument is as follows. Under Art. VI, Sec. 2 of the Constitution, treaties are also the supreme law of the land, and they have long been held equal to legislative acts. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829). The President, under Art. II, Sec. 3, has the duty to see to it that the laws of the United States, including its treaties, are faithfully executed. When there is a conflict between executive action and the provisions of a treaty or legislation, the executive action is invalid. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Where the executive is engaged in violations of the treaties and international undertakings of the United States, the use of the draft law to assist the executive in such violation becomes unconstitutional under Art. VI, Sec. 2. For this reason, a registrant who has been ordered to report for induction should be able to refuse on the ground that the draft law is being used at the present time in furtherance of

unconstitutional action of the part of the executive, and that under the rationale of *The Selective Draft Law Cases*, 245 U.S. 366 (1918), Congress does not have the power to compel military service for such a purpose.

In reliance on *United States v. Mitchell*, 369 F.2d 323 (2nd Cir., 1966), *cert. denied*, 386 U.S. 972 (1967), the Court of Appeals held that the claim of violation of international law "is no defense to a prosecution for failure to submit to induction into the Armed Forces." The reasons for granting certiorari in that case were set forth by Mr. Justice Douglas, dissenting from the denial thereof, 386 U.S. at 972-974, and it is respectfully submitted that the Court should reconsider its position and grant certiorari in the case at bar. In support of that contention, petitioner would make the following additional points.

There may be a difference between a case such as *Mora v. McNamara*, 387 F.2d 862 (D.C.Cir., 1967), *cert. denied*, 389 U.S. 934 (1967), where the question of the illegality of American military involvement in Vietnam arises in a suit for injunctive relief and a case such as *United States v. Mitchell*, *supra*, and the case at bar, where the illegality of American military involvement is asserted as a *defense* to a criminal prosecution. It may be that considerations of the proper balance between the executive and judicial branches would cause the court to refrain from attempting to enjoin the executive from carrying on a war in violation of international law or from sending troops there. *Pauling v. McNamara*, 331 F.2d 796 (D.C. Cir., 1963), *cert. denied*, 377 U.S. 933 (1964). See also *The Prize Cases*, 67 U.S. (2 Black) 635 (1863). In the case at bar, however, it is the executive branch which has come to the courts, demanding their assistance in compelling persons to render military service. The executive branch cannot demand that the courts imposes punishment and at the same time deny the courts the power to consider

the defense of international law. *United States v. Klein*, 80 U.S. (13 Wall.) 138 (1871).

This is all the more so, since the defense which the petitioner wishes to assert in the criminal prosecution involves a question which is justiciable, namely whether a nation and individuals are engaged in illegal or aggressive war, or war crimes or crimes against humanity. *United States, et al. v. Hermann Wilhelm Goering, et al.* (Judgment of the Nuremberg Tribunal), 1946, 6 F.R.D. 73 (1947); *In re Yamashita*, 327 U.S. 1 (1946). Nor would resolution of this question constitute resolution of a political question in view of the test set forth by this Court in *Baker v. Carr*, 369 U.S. 186, 211-212 (1962). The Court is as competent as the executive to determine the questions of international law and is likely to take a more objective view. A decision finding the war to be illegal would not directly interfere with the ability of the executive to carry on the war or create a conflict between the two branches.

All the Court would be saying is that a young man, sincerely believing his country's military involvement in Vietnam to be in violation of international law, could not be sent to prison for five years without having had the opportunity to raise the question. This Court long ago stated:

> "...no Court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of the country: how can they then become auxiliary to the consummation of violations of law." *Bank of United States v. Owens*, 27 U.S. (2 Pet.) 527, 538 (1829).

If the executive branch is violating the solemn treaties of the United States and fundamental principles of international law, as the petitioner contends, the courts cannot - without becoming the "handmaid of iniquity" - assist the executive by convicting and imprisoning a citizen who refuses to

become a "resource" in this course of conduct. It is for this reason that the petitioner should be able to assert the claim of violation of international law as a defense to a prosecution for failure to submit to induction.

There is an even more important reason for allowing this question to be raised as a defense to a prosecution for refusal to submit to induction. At Nuremberg we assured the world that "while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, *including those which sit here now in judgment* (emphasis added)." Statement of Hon. Robert H. Jackson, Chief United States Prosecutor at Nuremberg, I Nazi Conspiracy and Aggression 172 (U.S. Gov't. Printing Office, 1946). But the government of the United States cannot be compelled to submit this question to any international tribunal. Under the Connally Reservation, the United States alone decides whether a particular question shall be submitted to the International Court of Justice. See 15 U.S. Dep't. of State Bull., 1946, pp. 452-453. And since the United States cannot be conquered by that small, poor and underdeveloped entity called "Vietnam," it will never be called to account before a "Saigon" or "Hanoi" tribunal. If we meant what we said at Nuremberg, if Nuremberg is to represent something other than "victor's law," and if the United States *is* engaged in aggression and violations of international law in Vietnam, *it is for the courts of this country to say so.*

This Court has said that "international law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677,700 (1900). Assuming that an individual citizen does not have standing to raise the question, *Pauling v. McNamara, supra,*

and that the courts may not enjoin the executive from sending troops to Vietnam, *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir., 1967), *cert. denied*, 389 U.S. 934 (1967), the only possible way in which the question could be raised is as a defense to a criminal prosecution for refusal to submit to induction. This is the most appropriate proceeding, because it is one in which the executive branch is taking the initiative and bringing a citizen before the Court, seeking his conviction because he refuses to cooperate with the war effort. The illegality of the war is not being asserted affirmatively, but as a defense to action undertaken against the citizen by the executive. If the citizen cannot assert as a defense the illegality of the war and the violations of international law allegedly being committed by the United States, *this matter will never be determined and we will have reneged on the assurances which we gave to the world at Nuremberg.* The principles of Nuremberg will be entitled to no greater respect than those of "victors' law." To allow this to happen will serve to undermine the rule of law in national and international life.

This Court should grant certiorari to resolve this question, with it tremendous implications for continued adherence to the rule of law.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 16710

FILED
JUN 10 1969
CARL W. REUSS, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DON BERTRAM PRATT, Defendant-Appellant.	APPEAL from United States District Court for the Western District of Kentucky.

Decided June 10, 1969.

Before: WEICK, Chief Judge, CELEBREZZE and McCREE, Circuit Judges.

WEICK, Chief Judge. This is an appeal from the District Court's judgment of conviction for wilfully refusing to submit to induction into the Armed Forces in violation of 50 U.S.C. App. § 462(a). Appellant was sentenced to five years' imprisonment and fined $10,000.

We find no merit in appellant's contention that the grand jury and the petit jury were improperly constituted, in violation of the Due Process Clause of the Fifth Amendment of the Constitution of the United States or of 28 U.S.C. App. § 1861 *et seq.* *Williams v. Baker*, 389 F.2d 691 (10th Cir. 1968); *United States v. Hoffa*, 349 F.2d 20 (6th Cir. 1965), *aff'd*, 385 U.S. 293 (1966), *rehearing denied*, 386 U.S. 951 (1967); *Rice v. Louisville & Nashville R.R. Co.*, 344 F.2d 770 (6th Cir. 1965).

Nor do we agree with appellant that the present Universal Military Training and Service Act as amended by the Military Selective Service Act of 1967, 50 U.S.C. App. § 451 *et seq.*,

to unconstitutional. *Selective Draft Law Cases*, 245 U.S. 366 (1918); *United States v. Butler*, 389 F.2d 178 (6th Cir. 1968), *cert. denied*, 391 U.S. 1039 (1968); *Talmanson v. United States*, 389 F.2d 811 (1st Cir. 1967), *cert. denied*, 391 U.S. 907 (1968); *United States v. Richmond*, 274 F.Supp. 43 (C.D.Cal. 1967).

Finally, appellant urges us to declare the Vietnam war illegal and in violation of international law. We are of the opinion that this claim is no defense to a prosecution for failure to submit to induction into the Armed Services. *United States v. Prince*, 395 F.2d 668 (2d Cir. 1968); *United States v. Mitchell*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 1024 (1967).

The observation which we made with respect to the severity of the sentence in *United States v. Mulloy*, (No. 18,709), — F.2d — (6th Cir. 1969) applies with equal force in this case.

Affirmed.

APPENDIX B

ORDER OF THE COURT OF APPEALS
DENYING PETITION FOR REHEARING

No. 18,710

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
AUG 2 1 1969
CARL W. REUSS, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee
vs
DON BERTRAM PRATT,
Defendant-Appellant

ORDER

Before WEICK, Chief Judge, CELEBREZZE and McCREE, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be denied.

Entered by order of the Court.

Carl W. Reuss

APPENDIX C

PERTINENT TEXT OF STATUTE INVOLVED

Universal Military Training and Service Act, as amended by the Military Selective Service Act of 1967 [50 App. U.S.C. Section 451 et seq.]

50 App. U.S.C. Section 451

(a) This Act may be cited as the "Universal Military Training and Service Act."

(b) The Congress declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation.

(c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.

(d) The Congress further declares, in accordance with our traditional military policy as expressed in the National Defense Act of 1916, as amended, that it is essential that the strength and organization of the National Guard, both Ground and Air, as an integral part of the first line defenses of this Nation, be at all times maintained and assured.

To this end, it is the intent of the Congress that whenever Congress shall determine that units and organizations are needed for the national security in excess of those of the Regular components of the Ground Forces and Air Forces,

and those in active service under this title [sections 451-454 and 455-471 of this Appendix], the National Guard of the United States, both Ground and Air, or such part thereof as may be necessary, together with such units of the Reserve components as are necessary for a balanced force, shall be ordered to active Federal service and continued therein so long as such necessity exists.

(e) The Congress further declares that adequate provision for national security requires maximum effort in the fields of scientific research and development, and the fullest possible utilization of the Nation's technological, scientific, and other critical manpower resources.

50 App. U.S.C. Section 454(a)

Except as otherwise provided in this title [sections 451-454 and 455-471 of this Appendix], every male citizen of the United States and every male alien admitted for permanent residence who is between the ages of 18 years and 6 months and 26 years, at the time fixed for his registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title [section 453 of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], shall be liable for training and service in the Armed Forces of the United States: *Provided*, That each registrant shall be immediately liable for classification and examination, and shall, as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces:

Provided further, That, notwithstanding any other provision of law, any registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall be immediately inducted: *Provided further*, That any male alien who is between the ages of 18 years and 6 months and 26 years, at the time fixed for registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title [section 453 of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], who has remained in the United States in a status other than that of a permanent resident for a period exceeding one year (other than an alien exempted from registration under this title [sections 451-454 and 455-471 of this Appendix] and regulations prescribed thereunder) shall be liable for training and service in the Armed Forces of the United States, except that any such alien shall be relieved from liability for training and service under this title [said sections] if, prior to his induction into the Armed Forces he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any alien who makes such application shall thereafter be debarred from becoming a citizen of the United States. The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title [said sections] (including but not limited to selection and induction by age group or age groups) such number of persons as may be required to provide and maintain the strength of the Armed Forces.

At such time as the period of active service in the Armed Forces required under this title [said sections] of persons

who have not attained the nineteenth anniversary of the day of their birth has been reduced or eliminated pursuant to the provisions of section 4(k) of this title[subsection (k) of this section], and except as otherwise provided in this title [sections 451-454 and 455-471 of this Appendix], every male citizen of the United States who is required to register under this title [sections 451-454 and 455-471 of this Appendix], and who has not attained the nineteenth anniversary of the day of his birth on the date such period of active service is reduced or eliminated, or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], and every male alien admitted for permanent residence who is required to register under this title [sections 451-454 and 455-471 of this Appendix], and who has not attained the nineteenth anniversary of the day of his birth on the date such period of active service is reduced or eliminated, or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], shall be liable for training in the National Security Training Corps: *Provided*, That any male alien who is required to register under the provisions of this title [sections 451-454 and 455-471 of this Appendix], and who has not reached the nineteenth anniversary of the date of his birth on the date such period of active service is reduced or eliminated, or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], who has remained in the United States in a status other than that of a permanent resident for a period exceeding one year shall be liable for training in the National Security Training Corps except that any such alien shall be relieved from such training under this title [sections 451-454 and 455-471 of this Appendix] if, prior to his induction into the National Security Training Corps he has made application to be

relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any alien who makes such application shall thereafter be debarred from becoming a citizen of the United States: *Provided further*, That persons deferred under the provisions of section 6 of this title [section 456 of this Appendix] shall not be relieved from liability for induction into the National Security Training Corps solely by reason of having exceeded the age of nineteen years during the period of such deferment. The President is authorized, from time to time, whether or not a state of war exists, to select and induct for training in the National Security Training Corps as hereinafter provided such number of persons as may be required to further the purposes of this title [sections 451-454 and 455-471 of this Appendix].

No person shall be inducted into the Armed Forces for training and service or shall be inducted for training in the National Security Training Corps under this title [sections 451-454 and 455-471 of this Appendix] until his acceptability in all respects, including his physical and mental fitness, has been satisfactorily determined under standards prescribed by the Secretary of Defense: *Provided*, That the minimum standards for physical acceptability established pursuant to this subsection shall not be higher than those applied to persons inducted between the ages of 18 and 26 in January 1945: *Provided further*, That the passing requirement for the Armed Forces Qualification Test shall be fixed at a percentile score of 10 points: *And provided further*, That except in time of war or national emergency declared by the Congress the standards and requirements fixed by the preceding two provisos may be modified by the President under such rules and regulations as he may prescribe.

No persons shall be inducted for such training and service until adequate provision shall have been made for such shelter, sanitary facilities, water supplies, heating and lighting arrangements, medical care, and hospital accommodations for such persons as may be determined by the Secretary of Defense or the Secretary of the Treasury to be essential to the public and personal health.

The persons inducted into the Armed Forces for training and service under this title [sections 451-454 and 455-471 of this Appendix] shall be assigned to stations or units of such forces. Persons inducted into the land forces of the United States pursuant to this title [said sections] shall be deemed to be members of the Army of the United States; persons inducted into the naval forces of the United States pursuant to this title [said sections] shall be deemed to be members of the United States Navy or the United States Marine Corps or the United States Coast Guard, as appropriate; and persons inducted into the air forces of the United States pursuant to this title [said sections] shall be deemed to be members of the Air Force of the United States.

Every person inducted into the Armed Forces pursuant to the authority of this subsection after the date of enactment of the 1951 Amendments to the Universal Military Training and Service Act [June 19, 1951] shall, following his induction, be given full and adequate military training for service in the armed force into which he is inducted for a period of not less than four months, and no such person shall, during this four months' period, be assigned for duty at any installation located on land outside the United States, its Territories and possessions (including the Canal Zone): *Provided*, That no funds appropriated by the Congress shall be used for the purpose of transporting or maintaining in violation of the provisions of this paragraph any person

inducted into, or enlisted, appointed, or ordered to active duty in, the Armed Forces under the provisions of this title [sections 451-454 and 455-471 of this Appendix].

No person in the medical, dental, and allied specialist categories shall be inducted under the provisions of this subsection if he applies or has applied for an appointment as a Reserve officer in one of the Armed Forces in any of such categories and is or has been rejected for such appointment on the sole ground of a physical disqualification.

No person, without his consent, shall be inducted for training and service in the Armed Forces or for training in the National Security Training Corps under this title [said sections], except as otherwise provided herein, after he has attained the twenty-sixth anniversary of the day of his birth.

50 App. U.S.C. Section 455

(a)(1) The selection of persons for training and service under section 4 [section 454 of this Appendix] shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted: *Provided*, That in the selection of persons for training and service under this title [sections 451-454 and455-471 of this Appendix], and in the interpretation and execution of the provisions of this title [said sections], there shall be no discrimination against any person on account of race or color: *Provided further*, That in the classification of registrants within the jurisdiction of any local board, the registrants of any particular registration may be classified, in the manner prescribed by and in accordance with rules and regulations

prescribed by the President, before, together with, or after the registrants of any prior registration or registrations; and in the selection for induction of persons within the jurisdiction of any local board and within any particular classification, persons who were registered at any particular registration may be selected, in the manner prescribed by and in accordance with rules and regulations prescribed by the President, before, together with, or after persons who were registered.

(b) Quotas of men to be inducted for training and service under this title [sections 451-454 and 455-471 of this Appendix] shall be determined for each State, Territory, possession, and the District of Columbia, and for subdivisions thereof, on the basis of the actual number of men in the several States, Territories, possessions, and the District of Columbia, and the subdivisions thereof, who are liable for such training and service but who are not deferred after classification, except that credits shall be given in fixing such quotas for residents of such subdivisions who are in the armed forces of the United States on the date fixed for determining such quotas. After such quotas are fixed, credits shall be given in filling such quotas for residents of such subdivisions who subsequently become members of such forces. Until the actual numbers necessary for determining the quotas are known, the quotas may be based on estimates, and subsequent adjustment therein shall be made when such actual numbers are known. All computations under this subsection shall be made in accordance with such rules and regulations as the President may prescribe.

(c) Notwithstanding any other provision of law, any qualified person who–

(1)is liable for induction; or

(2)as a member of a Reserve component is ordered to active duty,

as a physician, or dentist, or in an allied specialist category in the Armed Forces of the United States, shall, under regulations prescribed by the President, be appointed, reappointed, or promoted to such grade or rank as may be commensurate with his professional education, experience, or ability: *Provided*, That any person in a needed medical, dental, or allied specialist category who fails to qualify for, or who does not accept, a commission, or whose commission has been terminated, may be used in his professional capacity in an enlisted grade.

50 App. U.S.C. Section 456(h)

(1) Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he

has been enrolled, a hardship or undue degree, except for extreme hardship or dependency under regulations governing hardship determinations, or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as an registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exemptions provided in the preceding sentence. As used in this subsection, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after deferments and exemptions.

(2) Except as otherwise provided in this subsection the President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons whose employment in industry, agriculture, or other occupations or employments, or whose continued service in an Office (other than an Office described in subsection (i) under the United States or any State, territory, or possession, or the District of Columbia, or whose activity in graduate study, research, or medical, dental, veterinary, optometrical, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest: Provided, That no person within any such category shall be deferred except upon the basis of his individual status: Provided further, That persons who are or may be deferred

under the provisions of this section shall remain liable for training and service in the Armed Forces under the provisions of section 4(a) of this Act [section 454(a) of this Appendix] until the thirty-fifth anniversary of the date of their birth. This proviso shall not be construed to prevent the continued deferment of such persons if otherwise deferable under any other provisions of this Act. The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces (1) of any or all categories of persons in a status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable, and (2) of any or all categories of those persons found to be physically, mentally, or morally deficient or defective. For the purpose of determining whether or not the deferment of any person is advisable, because of his status with respect to persons dependent upon him for support any payments of allowances which are payable by the United States to the dependents of persons serving in the Armed Forces of the United States shall be taken into consideration, but the fact that such payments of allowances are payable shall not be deemed conclusively to remove the grounds for deferment when the dependency is based upon financial considerations and shall not be deemed to remove the ground for deferment when the dependency is based upon other than financial considerations and cannot be eliminated by financial assistance to the dependents. Except as otherwise provided in this subsection, the President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family

relationship in their homes. No deferment from such training and service in the Armed Forces shall be made in the case of any individual except upon the basis of the status of such individual. There shall be posted in a conspicuous place at the office of each local board a list setting forth the names and classifications of those persons who have been classified by such local board. The President may, in carrying out the provisions of this title [sections 451-454 and 455-471 of this Appendix], and to the extent that such action is determined by the President to be consistent with the national interest, recommend that such criteria be administered uniformly throughout the United States wherever practicable; except that no local board, appeal board, or other agency of appeal of the Selective Service System shall be required to postpone or defer any person by reason of his activity in study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors found to be necessary to the maintenance of the national health, safety, or interest solely on the basis of any test, examination, selection system, class standing, or any other means conducted, sponsored, administered, or prepared by any agency or department of the Federal Government, or any private institution, corporation, association, partnership, or individual employed by an agency or department of the Federal Government.

50 App. U.S.C. Section 462 (a)

Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-454 and 455-471 of this Appendix], or the rules or regulations made

or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said section], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said section], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said section], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said section], or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said section], or rules, regulations, or directions made pursuant to this title [said section], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this [said section] or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such

punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title [omit section] unless such person has been actually inducted for the training and service prescribed under this title [omit section] or unless he is subject to trial by court martial under laws in force prior to the enactment of this title [June 24, 1948]. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

APPENDIX D

Pertinent Text of Treaties Involved
Charter of the International Military Tribunal
at Nuremberg
(Treaty of London)

[59 Stat. 1544]

Article 6

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave

taken or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 7

The official position of Defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

United Nations General Assembly Resolution 95(1)
Adopted 11 December, 1946
(Dept. of State Pub. 2725, pp. 129-130)

The General Assembly,

Recognizes the obligation laid upon it by Article 13, paragraph 1, sub-paragraph a, of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;

Therefore,

Affirms the principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal;

Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, or the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal.

Charter of the United Nations

(59 Stat. 1031)

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace...

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

...

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.

Article 32

Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute.

Article 33

1. The parties to any dispute, the continuance of which is

likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

Article 35

2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

Article 37

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed

attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Article 52

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter

and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Geneva Convention on Prisoners of War, 1949

[6 U.S.T.O.I.A. 3317]

Article 12

Prisoners of war are in the hands of the enemy power, but not of the individuals or military units who have captured them. Irrespective of the individuals' responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Article 17

No physical or mental torture nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatsoever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

Geneva Accords of 1954

Article 17

(a) With effect from the date of entry into force of the present Agreement, the introduction into Vietnam of any

reinforcements in the form of all types of arms, munitions and other war material, such as combat aircraft, naval craft, pieces of ordnance, jet engines and jet weapons, and armoured vehicles, is prohibited.

Article 18

With effect from the date of entry into force of the present Agreement, the establishment of new military bases is prohibited throughout Vietnam territory.

Article 19

With effect from the date of entry into force of the present Agreement, no military base under the control of a foreign State may be established in the regrouping zone of either party; the two parties shall ensure that the zones assigned to them do not adhere to any military alliance and are not used for the resumption of hostilities or to further an aggressive policy.

Final Declaration

6. The Conference recognizes that the essential purpose of the agreement relating to Vietnam is to settle military questions with a view to ending hostilities and that the military demarcation line is provisional and should not in any way be interpreted as constituting a political or territorial boundary. The Conference expresses its conviction that the execution of the provisions set out in the present declaration and in the agreement on the cessation of hostilities creates the necessary basis for the achievement in the near future of a political settlement in Vietnam.

7. The Conference declares that, so far as Vietnam is

[redacted]

APPENDIX B

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS, UNITED STATES V. DON BERTRAM PRATT, U.S. DIST. CT., W.D. KENTUCKY, APRIL 4, 1968, HON. JAMES F. GORDON, U.S. DIST. JUDGE

• • • • • • • • • •

DON BERTRAM PRATT, called as a witness, by the defendant, having been first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION BY MR. ROBERT A. SEDLER

• • • • • • • • •

Q. Don, while you were a student were you enrolled in the Reserve Officers Training Corps?

A. Yes.

Q. Or program?

A. Yes. I graduated from the Reserve Officers Training Corps and was to be commissioned up until a point last semester.

Q. Did you receive an honorable discharge from the Armed Services of the United States and a certificate as a testimonial of faithful service?

A. Yes, I did.

Q. Don, you didn't complete the program, did you?

A. I completed the ROTC program and was to be commissioned based on graduation from college.

Q. You were not – you did not accept a commission; is that correct?

A. The commission was put up to question when at one point I was seeing the Colonel in charge of Military Science on the basis of the fact that I had questions of our duties and obligations in Vietnam and therefore questioned any duties and obligations of an ROTC officer.

They called me in at one point and asked me what they felt should be done and at that point they asked me if I could fulfill all of the duties and obligations of a reserve officer at which point I said no, based on the fact that they said that what –

MR. SMITH: (Interrupting) Your Honor, of course, this is hearsay, what they said, what somebody else said.

BY THE COURT: Well, let him go ahead.

THE WITNESS: And based on the fact that this was a point in history with the Vietnam War as a reference point.

Q. Now, Don, you were ordered to report for induction and you have heard the testimony of Lieutenant Wray as to what occurred. Is it correct to say that you refused to submit to the – you refused to take tests that they asked you and you refused to take a physical examination?

A. Yes. I refused processing at the point of beginning to go through processing.

Q. Why did you refuse to take a physical examination?

A. I have a lung condition which is pneumothorax, I believe is the appropriate medical term and I felt that if I was to go through processing that I might be disqualified based on that lung condition, which is a collapsed lung, reoccurred.

Q. Why wouldn't you let them examine you to determine that fact?

A. If I was to be disqualified for my medical – if I – if I was to be disqualified because of my medical deferment then

I would not be able to say to my nation and my country that this war is wrong by refusing induction and I felt that this is most appropriate and I also feel that the political -- the political classification is quite discriminatory, not in reference to my own Local Board in particular, but at certain points in history it has been quite discriminatory as an agent to disqualify certain individuals.

Q. Why did you feel that you had to take this position?

A. My basic disagreement is with the Vietnam War and with the draft system and the injustices and inequality to the draft and I had to take this position based on my views, the historical aspect of --

MR. SMITH: (Interrupting) Your Honor, now, at this point I think it is getting to be a bit --

BY THE COURT: (Interrupting) Well, the Court is going to let the young man tell his story and then the Court will handle it in the instructions to the jury.

Q. Proceed, Don.

A. Based on the historical views which I have had and which a lot of people are quite aware of, Vietnam is quite a controversy in my mind, in my life, and I don't believe that I could serve as an officer nor as an enlisted man, either, to relieve a man to go any place or to go in his place or go as a -- as a resource of the United States Army in this war and that was basically the reason, plus the fact that our Government obviously is committing some atrocities which I do not completely agree with nor would I agree regardless of --

BY THE COURT: (Interrupting) Well now, this is as far as I am going to let this go, Mr. Sadler. It is so incompetent -- let's proceed.

Q. I would like to just ask then one or two more questions for the record if I may. I think you have stated your position. Did you feel that if you had been inducted into the Armed

Forces that you could not obey certain orders that might be given to you?

A. Definitely, yes.

Q. Why could you not obey those orders?

A. Because of the fact that I'd be forcing myself on someone else and I definitely do not want to do this by physical means.

MR. SEDLER: May I approach the bench, Your Honor?

(WHEREUPON, COUNSEL APPROACH THE BENCH AT THIS POINT)

MR. SEDLER: Your Honor, I realize we are stepping close to the line. I don't want to go too much further, but there were three questions that I wanted to ask which are relevant to our defense. These would be, "Will you obey an order to drop napalm on persons," and number two, "Will you obey an order to execute wounded prisoners," and number three, "Will you obey an order to participate in combat in Vietnam."

BY THE COURT: You may put those into the record in the form of an avowal and give the answers that you desire.

MR. SEDLER: Let the record show that counsel would ask the defendant the following questions:

"Would you obey an order to drop napalm on persons including women and children?" And the defendant would answer the question no.

"Would you obey an order to execute wounded prisoners?" And the defendant would answer no.

"Will you obey an order to participate in combat in Vietnam?" And the defendant would answer the question no.

The reasons would be that to engage in such action would be in violation of the defendant's responsibilities under International Law.

(WHEREUPON, COUNSEL RETURN TO COUNSEL TABLE AT THIS POINT)

Q. Don, would you say once again why you refused to submit to processing?

A. Because of the lung condition which would probably defer me from the services and probably defer me before I could refuse induction.

MR. SEDLER: That's all, your Honor.

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COURT'S INSTRUCTIONS

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MR. SEDLER: The counsel for the defendant objects to that portion of the instructions reading, "No citizen has the constitutional right to refuse to obey the provisions of the Selective Service Act," believing that the instruction is incomplete and misleading and that a citizen may, because of his duties to International Law, be required to disobey certain provisions of the Act in certain circumstances. Otherwise, there is no objection.

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BY THE COURT: Mr. Pratt, do you have anything you'd like to say to the Court before judgment is pronounced?

MR. PRATT: Yes, I will read a statement which I have made -- I have written earlier. I would like to say that,

> "With current developments rapidly changing the complexity of the war in Vietnam today of course questions of my position and the basis of my previous stance arise. To this I respond first by saying I am as optimistic as anyone in this room and as hopeful for

peace for that nation, but as easily as the picture has changed one way, the view may be shifted the other, and with such measures as our military has now, other types of Vietnams can be created or this one re-erupted, but without any physical and moral existence and that which is most important is the reasoning for any stance prior to current political developments which I share with you now.

"The United States, or I should say the Administration and the Pentagon and its citizen supporters, are engaged in a war of aggression against the nation and peoples of Vietnam. Not against the nation and peoples of North Vietnam or of South Vietnam positioned as two different nations, for that is part of the issue for calling this war, a war of aggression. Both these people and many Americans know that that nation is not divided except by a demarcation line, twelve years past due or twelve years past 'temporary.'

"We fight against a people divided by economic, political, religious, and social interests of a few that truly do not represent Vietnam, and often were not and are not Vietnamese. I refer to the Japanese, French, and currently the Americans who all have tried to influence and control that small nation. As to those Vietnamese that we support, they are the Diems, the Kys, the Thieus, the absentee landlords, and the corrupt officials within Vietnam that thrive on America's so called 'freedom and patriotic determinations for Vietnam.'

"Nationalism is the force we fight in that country and it is false logic to say we are determined to stop communism. We a people who believe in self-determination suppress such even now at home while suppressing people and their freedom even more obvi-

only is Vietnam. We have outside existence and their relationship to the so-called enemy, communism, because of their nationalistic desires in opposition to our military presence.

"This form of pressure, the U.S. Armed Forces, even if in the United States, would certainly not promote freedom and local self-determination -- maybe the reason for keeping down the numbers of state-side forces. But it is quite apparent that what the military presence doesn't do here, the politicians, the Pentagon, and industrial interest will do. But this, related to Vietnam, spells out the fact that these people thrive on war, and particularly this war.

"This says nothing as to the weapons and methods of war which we use on that small, Southeast Asian nation, and those we possibly may use tomorrow. Concentration camps (called strategic hamlets or pacification villages), identification cards, defoliation, various lethal guns, napalm, ... to name a few are things we fought against and judged others for, two decades ago. Now we must judge ourselves. We who have made the fight for democracy no different than the cries of a 'Master Race.' We who have made pacification no different than persecution. We who have thus made military service no different than political slavery.

"I find it somewhat hypocritical that we --

"Value peace, but produce war,

"Value life, but produce death,

"Value freedom, but produce suppression and servitude,

"Value democracy, but produce no choice.

"Then you ask me to fight for our country here as well as abroad. Then you tell me that I must fight or

'figuratively' die in prison. Then you interpret laws directed toward me to sanctify hypocritical beliefs.

"With that I say that the 'me' is not just Don B. Pratt the individual who stands in court but also the numerous realistic, idealistic youth of the United States on the one hand and yourselves on the other."

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 666

DON BERTRAM PRATT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 412 F. 2d 426.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1969. A petition for rehearing was denied on August 29, 1969. The petition for a writ of certiorari was filed on September 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Universal Military Training and Service Act, as amended by the Military Selective Service Act of 1967, particularly in providing for the deferment of college students, is constitutional.

2. Whether petitioner may challenge the legality under international law of the Vietnam conflict as a defense to a prosecution for failure to submit to induction into the Armed Forces.

3. Whether the Selective Service laws may constitutionally be applied to require induction into the Armed Forces of a person who opposes the Vietnam conflict.

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Kentucky for wilfully refusing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462 (a). On April 8, 1968, he was sentenced to imprisonment for five years and fined $10,000.

On September 20, 1962, petitioner registered with his local Selective Service board. On July 12, 1967, after petitioner had been a student at the University of Kentucky for over five years, he was classified I-A. For a time during those five years he held a II-S or student deferment.[1] On January 26, 1968, after he had previously refused to report for a physi-

[1] He had successfully completed the ROTC program at college, but had refused to accept a commission as an Army officer (Pet. App. F, 28a-29a).

cal examination, he was ordered to report for induction. At the induction center he refused processing—the taking of various tests and a physical examination—and refused to submit to induction.

At trial petitioner admitted that he failed to submit to processing at the induction station. He asserted that if he had taken the physical examination, he might have been physically disqualified for military service and thus would not have been able to express his disagreement with the Vietnam conflict by refusing induction. He said that he could not serve in the Armed Forces because he might be forced to disobey military orders which violated international law (Pet. App. E, 29a-31a).

ARGUMENT

1. Petitioner concedes that Congress has the constitutional authority to require compulsory military service, and further that Congress may lawfully provide for certain limited exemptions of individuals from service. Essentially, his argument is that the present draft law, as written and administered, violates due process by allowing deferments to all college students and thereby discriminating "against persons of lower socio-economic status, particularly with respect to the burden of rendering combatant service" (Pet. 20). Since petitioner himself was the beneficiary of a student deferment, he hardly has standing to claim that such deferments give "those in the favored class the opportunity to choose the time of their service, [and] substantially [reduce] the probability that if and when they do serve, they will

have to perform combatant service" (Pet. 23). See *Taimanson* v. *United States*, 386 F. 2d 811 (C.A. 1), certiorari denied, 391 U.S. 907. In any event, the "constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States* v. *O'Brien*, 391 U.S. 367, 377. In the exercise of that power, Congress may provide for exemption from service for some persons and delayed service for others, so long as the scheme is not wholly lacking in rationality. See *Korte* v. *United States*, 280 F. 2d 633 (C.A. 9), certiorari denied, 358 U.S. 928.[1]

2. Petitioner's contention that the Vietnam conflict is illegal since allegedly in violation of international law was properly rejected. This claim raises a political question and, in any event, provides no defense to a prosecution for failure to submit to induction into the Armed Forces. *United States* v. *Mitchell*, 369 F. 2d 323 (C.A. 2), certiorari denied, 386 U.S. 972; *United States* v. *Prince*, 393 F. 2d 686, 688 (C.A. 2), certiorari denied, 393 U.S. 946; *Ashton* v. *United States*, 404 F. 2d 95, 97 (C.A. 8), certiorari denied, 394 U.S. 960.

3. The remaining issue presented in this case—the claim that petitioner may contest his induction into the Armed Forces on the ground that he opposes the Vietnam conflict on other than religious grounds—is at least arguably embraced within the questions

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[1] See also *Boyd* v. *Clark*, 393 U.S. 816, and the discussion in the government's motion to dismiss or affirm filed in that case (No. 490, 1968 Term).

presented in *United States* v. *Sisson*, No. 305, this Term, jurisdiction postponed to the merits, October 12, 1969. Unlike *Sisson*, however, the district court made no finding here as to the sincerity of petitioner's objection to the Vietnam conflict, and petitioner has of course never sought conscientious objector status.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1969.

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